

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF TEXAS
3 SAN ANTONIO DIVISION

4 UNITED STATES OF AMERICA,)
5)
6 v.) Docket No. 5:17-CR-380-DAE
7)
8 (1) CARLOS I. URESTI,) San Antonio, Texas
9 (2) VERNON C. FARTHING, III,) August 30, 2018
10) 10:03 a.m. to 11:07 a.m.
11 Defendants.)
12)
13)
14)
15)
16)
17)
18)
19)
20)
21)
22)
23)
24)
25)

8 TRANSCRIPT OF MOTION HEARING AND JURY TRIAL MATTERS HEARING
9 BEFORE THE HONORABLE HENRY J. BEMPORAD
10 UNITED STATES MAGISTRATE JUDGE

11 A P P E A R A N C E S:

12 FOR THE GOVERNMENT:

13 UNITED STATES ATTORNEY'S OFFICE
14 By: Joseph Blackwell, Esquire
15 By: Sean O'Connell, Esquire
16 601 N.W. Loop 410, Suite 600
17 San Antonio, TX 78216

18 FOR DEFENDANT URESTI:

19 WATTS GUERRA, LLP
20 By: Mikal Watts, Esquire
21 Four Dominion Drive
22 Building Three, Suite 100
23 San Antonio, TX 78257

24 FOR DEFENDANT FARTHING:

25 GOLDSTEIN, GOLDSTEIN, HILLEY & ORR
By: Gerald H. Goldstein, Esquire
By: Cynthia Hujar Orr, Esquire
By: John Torrey Hunter, Esquire
29th Floor, 310 S. St. Mary's Street
San Antonio, TX 78205-3199

26 COURT RECORDER: FTR Gold

27 TRANSCRIBER:

28 CHRIS POAGE
29 655 East Cesar E. Chavez Blvd., Suite G-65
30 San Antonio, TX 78206
31 Telephone: (210) 244-5036

1 (Open court at 10:03 a.m.)

2 THE COURT: Calling the case of SA:17-CR-380,
3 defendant number two, United States of America versus Vernon
4 Farthing. If I could have announcement of counsel, please.

5 MR. BLACKWELL: Good morning, Your Honor. Joe
6 Blackwell and Sean O'Connell here for the United States.

7 THE COURT: All right. Good morning.

8 MR. BLACKWELL: Good morning, sir.

9 MR. HUNTER: Good morning, Your Honor. John Hunter,
10 Gerry Goldstein, Cynthia Orr for Mr. Farthing.

11 THE COURT: All right. Good morning to y'all as well.

12 MR. GOLDSTEIN: Good morning, Your Honor.

13 THE COURT: And I see that, though Mr. Uresti doesn't
14 have a hearing -- or a motion before the Court at this time, I
15 see that the senator is here, along with his counsel.

16 Mr. Watts, welcome. I'm glad that you're here, because I
17 was hoping maybe, after this part of the hearing is complete,
18 to discuss jury selection in the case briefly with the parties
19 since we're all here.

20 MR. WATTS: Absolutely.

21 THE COURT: But I think it'd be better to go ahead and
22 start with this motion. Then we can turn to that afterwards.

23 MS. ORR: And, Your Honor, to advise the Court --

24 THE COURT: Yeah.

25 MS. ORR: -- Mr. Blackwell called our office, and

1 there's a couple of things that Mr. Goldstein and Mr. Blackwell
2 will want to put on the record as well --

3 THE COURT: All right.

4 MS. ORR: -- that's unrelated to --

5 THE COURT: I'm happy to allow y'all to do that.
6 That's no problem.

7 MR. GOLDSTEIN: Thank you.

8 THE COURT: So we're here then on the motion that has
9 been referred to the Court, which is Mr. Farthing's motion for
10 bill of particulars, Docket Entry 73. And I'll hear from the
11 defense.

12 MR. HUNTER: Thank you, Your Honor.

13 As the Court is well aware, Judge Ezra has denied the
14 defense's motion to dismiss the indictment. The government
15 maintains that this decision obviates a need for a bill of
16 particulars. But to the contrary, I think it makes it all the
17 more important that we have additional specificity before we
18 proceed to trial.

19 The bribery statute is essentially a choose your own
20 adventure story. It has a wide variety of variables that are
21 going to fit in any given particular case, that the government
22 is supposed to choose from in order to define the crime
23 sufficient for notice and due process.

24 For example, what agency of government are we talking
25 about, whether the offer was accepted, whether there was an

1 agreement to accept, whether there was a solicitation of an
2 offer or a demand for some sort of thing of value from a
3 specific person, whether the intent to act corruptly was done
4 with the intent to be influenced or, rather, with the intent to
5 be rewarded. And lastly, whether it was done in connection
6 with a business, a transaction, a series of transactions,
7 et cetera.

8 In particular to this case, the problem we see is, that
9 it's not really clear from the face of the indictment whether
10 or not a *quid pro quo* is alleged.

11 THE COURT: Can I stop you right there?

12 MR. HUNTER: Yes, Your Honor.

13 THE COURT: Because that's the -- as you know, I went
14 down this road pretty far on the request for disclosure of
15 grand jury materials. And ultimately that was decided on
16 another issue, the secrecy of grand jury. But we had a pretty
17 lengthy conversation between the parties about this issue of
18 whether this is a gratuities indictment or whether this is a
19 bribery indictment.

20 MR. HUNTER: Correct.

21 THE COURT: Can you tell me what your view of
22 Judge Ezra's ruling denying the motion to dismiss the
23 indictment, because it talks at length about that issue. And I
24 will be frank with the parties. I'm not going to reconsider
25 anything that the judge has already decided. So you'll have to

1 tell me why that discussion leaves something open for the bill
2 of particulars with regard to this issue.

3 MR. HUNTER: Yes, Your Honor. I think it creates
4 several issues that need attention here. The first is, as
5 Judge Ezra notices and acknowledges in his decision, there is a
6 split of authority, a lack of unanimity among the circuits
7 about whether or not 666 covers gratuities at all. This
8 circuit is generally, I think, believing in the direction that
9 it is covered, although I don't believe there's a specific
10 opinion from the Fifth Circuit to that effect.

11 THE COURT: Okay. I have to stop you again. Didn't
12 Judge Ezra -- he says he's going with the majority based on the
13 language of the -- of the statute.

14 MR. HUNTER: Correct, Your Honor.

15 THE COURT: And even if you disagree with that, of
16 course, you have the right to preserve that issue, but why
17 would I be ruling differently than the judge on that matter?

18 MR. HUNTER: Well, we don't ask you to --

19 THE COURT: All right. Very well.

20 MR. HUNTER: -- at all reconsider what Judge Ezra has
21 previously done. While we take exception to Judge Ezra's
22 ruling, we recognize that that is going to be the law of the
23 case in this trial.

24 But we have an obligation to preserve. And we --

25 THE COURT: Sure.

1 MR. HUNTER: -- want this issue to be considered by
2 the Fifth Circuit and by the Supreme Court, if necessary.

3 So in order to effectuate that, the first question is, is
4 this the case that is going to decide that question? And
5 only -- that would only be the case if there is a gratuity-
6 based theory that the government is relying upon.

7 As the indictment presently reads, it is not clear whether
8 it is a gratuity or not. Judge Ezra does say that he finds
9 that there is sufficient allegation in the indictment to infer
10 a *quid pro quo*. And that, I think, doesn't necessarily
11 foreclose the inquiry, though, because there's still enough
12 room in that indictment for the government to come in at trial
13 and say, Look, folks, you don't need to have a *quid pro quo* to
14 complete this crime. It could have been an illegal gratuity.
15 And so you can convict if that was the understanding, that this
16 was to be a reward for an action that Judge Galindo would have
17 taken anyway.

18 And if that is a temptation the government encounters --
19 and it very well could encounter it. The evidence in this case
20 is such that they may not be able to satisfy a *quid pro quo*.
21 We need to be able to either prepare to defend against a
22 gratuity, or we need to know that the government will live or
23 die with their allegation that a *quid pro quo* occurred.

24 And we have that problem for a couple of different reasons.
25 The first is the indictment may generally lay out that a *quid*

1 *pro quo* existed in this case, but what that *quid pro quo* is is
2 not clear at all.

3 For example, in Judge Galindo's debrief with the government
4 Judge Galindo claims that the *quid pro quo* was, in essence --
5 pardon me one second, Your Honor. In his 302 he's claiming
6 that the *quid pro quo* was, in essence, that he would -- he
7 attended a public hearing on BOP procedure; that the bidding
8 price was \$7; and that he advised the Farthings well in advance
9 of this August meeting in 2006 that if they bid six or lower,
10 they should get the contract. That's the first claim of *quid*
11 *pro quo*.

12 But that isn't how it was presented to the grand jury. In
13 the grand jury proceedings we see them telling the grand jurors
14 that in legal terms the *quid pro quo* was whether or not you did
15 it in terms favorable to PNA and not to the people of Reeves
16 County who he represented; that he negotiated a lower -- that
17 if they negotiated a lower payment to PNA in the contract, that
18 would have been money that would have gone to the people of
19 Reeves County. Basically that the *quid pro quo* was he would
20 refrain from negotiating it. That's a distinct thing from --

21 THE COURT: Can I ask you a technical -- or a
22 discovery question --

23 MR. HUNTER: Yes.

24 THE COURT: -- before you go -- you mentioned Judge
25 Galindo's statement in the 302. I'm assuming that's an FBI 302

1 report from the agent.

2 MR. HUNTER: Yes, Your Honor.

3 THE COURT: So it's actually's the agent's statement,
4 not Galindo -- the judge's statement?

5 MR. HUNTER: That's correct. It's a hearsay --

6 THE COURT: And it's reflected in it.

7 Did the judge testify, to your knowledge, at the grand
8 jury? Was there grand jury testimony from the judge? I don't
9 --

10 MR. HUNTER: Not to my knowledge, Your Honor.

11 THE COURT: Okay. So what they had was agent
12 testimony, I think it was Agent Giese's testimony, to the grand
13 jury. And that's how it would have been related?

14 MR. HUNTER: Right. So what we're talking about are
15 --

16 THE COURT: All right. Very well. I just wanted to
17 make sure I knew what we were talking about in terms of the
18 discovery. But go ahead.

19 MR. HUNTER: I apologize. Yes. That is --

20 THE COURT: No, no, no, no. You were -- you were
21 clear. It was me who didn't understand.

22 MR. HUNTER: That is -- that is the issue. We have
23 one government agent telling us that the *quid pro quo* was a
24 specific recommendation as to a price quote, another indication
25 that the *quid pro quo* was just generally a failure to

1 negotiate. So we have a lot of problems there.

2 We also have to deal with the fact that we're talking about
3 a very long timeline of events. Galindo describes these things
4 not happening in any contemporaneous fashion. And I don't
5 think that we have evidence that would plainly show a
6 smoke-filled room where all of the different components and
7 elements of this were agreed upon in one sitting. But rather,
8 we're talking about a string of conversations spanning before
9 and after it was clear that Reeves County was going to get this
10 contract and spanning before and after the vote that finalized
11 the agreement.

12 And I apologize. In Galindo's first interview he said
13 there was no *quid pro quo*. So we have a lot of conflicting
14 pieces of evidence to deal with. We're not going to be able to
15 draw a lot from the discovery that's available to ascertain
16 what their theory of *quid pro quo* is.

17 Now, it's a cooperating defendant. Mr. Galindo has pleaded
18 guilty. He's heavily referenced in the indictment. His
19 version of events is the government's version of events. They
20 should know what their theory of *quid pro quo* is, if it exists.

21 THE COURT: Let me -- I just have to press you on
22 that. That's -- the things that you're describing to me is
23 just the sorts of things that a defense uses to prepare their
24 defense. It's like you get on the stand, and he says, Oh, we
25 did this.

1 You say, Yeah, you did that. But a long time ago you said
2 the exact opposite. And then you said there was no *quid pro*
3 *quo*. Jury, don't believe this guy. He keeps changing his
4 story.

5 That's what preparing a defense is, as I understand it.
6 Unless you have -- unless there's like some -- that's why I was
7 asking about the grand jury question. If there's some secret
8 evidence that y'all haven't been provided yet, I need to know.
9 They may not be required to, but I would like to know about
10 that because that would then have an issue.

11 But it sounds like you've got a basis upon which to
12 challenge some of the things that are in the indictment as to
13 the statements made by Judge Galindo.

14 MR. HUNTER: Well, yes. But we need -- we need there
15 to be a line of demarcation; that if we cross it, we actually
16 win; that there would be a point at which we could say to this
17 this jury, They have failed to prove to you this element of the
18 offense beyond a reasonable doubt. Your only verdict must be
19 acquittal.

20 But we can't do that because the government has an escape
21 hatch. They get to run through the trial, arguing *quid pro*
22 *quo*, explaining why Judge Galindo was mistaken or he was
23 minimizing or whatever their excuses are going to be. And if
24 they realize that the jury's not buying it, they get to say,
25 Folks, you don't have to have a *quid pro quo*. It could be

1 gratuity. All it has to be is a reward. It could have all
2 been formulated after the fact, after Galindo left the office.
3 You don't have to worry about that.

4 THE COURT: All right.

5 MR. HUNTER: And so if, in fact, 666 covers both
6 bribes and gratuities, as this Court has held and as the
7 majority view states, then we need to have a solid commitment
8 from the government which theory this is, because we cannot
9 tell it from the face of the indictment.

10 THE COURT: All right.

11 MR. HUNTER: That's, I think, the most glaring problem
12 that we have. Everything in our motion for bill of particulars
13 functionally stems from that concern and the accompanying
14 concern. For example, we don't have to necessarily just think
15 of it in terms of *quid pro quo*. We can also think about it in
16 terms of official act. What is the exact official act that
17 Galindo is said to have done? It's not clear from the
18 indictment what that is.

19 What we do know is, we have these conflicting accounts.
20 Maybe it's a specific recommendation. Well, if it is a
21 specific recommendation as to a price, was that something that
22 was part of his official capacity to even know or understand?
23 Is it -- does it constitute the type of inside knowledge he
24 would be obligated not to disclose?

25 If it's about failing to negotiate, what was his duty, as

1 the commissioners court judge, to actually negotiate? And how
2 much negotiation is proper? These are all questions we can't
3 answer if we don't know the actual official act in question.

4 THE COURT: The idea being, I guess, if it's *quid pro*
5 *quo*, then it would be different in the sense that he would have
6 to have done something he otherwise would not have done.
7 Whereas, if it's a gratuity, whatever the scope of his acts,
8 even if he acted legally, could be paid off for it?

9 MR. HUNTER: Exactly.

10 THE COURT: Okay.

11 MR. HUNTER: And that's, I think, a major concern.

12 THE COURT: All right. Well, then here comes my
13 question. And this is the same question I have for
14 Mr. Blackwell. And then I'm happy to hear any other argument
15 you would like to make.

16 On Page 3 of the indictment, paragraph 11, there's a single
17 paragraph that says, This is the object of the conspiracy. And
18 that seems like a pretty binding thing to say, This is the
19 object of the conspiracy.

20 And it says, The object of this conspiracy is soliciting
21 and accepting payments, things of value, from Farthing,
22 Farthing's company and its successor companies in exchange for
23 favorable official action.

24 And then it says, And to hide and cover up the conspiracy.
25 That sounds more to me -- that's not gratuity. That's more

1 like money laundering. But in exchange for favorable action,
2 that sounds a lot like *quid pro quo* to me.

3 MR. HUNTER: Well --

4 THE COURT: In exchange -- that's what *quid pro quo*
5 means to my understanding, something in exchange for something
6 else. Why can't you hold them to that object? And if they try
7 to prove a different object at trial, then you would do what
8 Ms. Orr was arguing to me the last time we were here, saying,
9 Wait a minute. This is a Stirone problem. This is a
10 constructive indictment. This indictment needs -- this
11 issue -- something other than "in exchange for," that's got to
12 be presented to the grand jury. It hasn't been. We move to
13 dismiss.

14 Why wouldn't that be your remedy here?

15 MR. HUNTER: Well, I think, again, it's just too
16 nebulous of a description. In exchange for an official act,
17 but what official act are we talking about?

18 THE COURT: No. You're jumping out of a different
19 issue. Hold with me on the *quid pro quo*, and then we can talk
20 about the official act. On the *quid pro quo*, in exchange for,
21 doesn't that mean *quid pro quo*? Doesn't that mean it has to be
22 bribery, because a gratuity for any official act, legal or
23 illegal, is not *quid pro quo*. That's my question.

24 MR. HUNTER: Well, if in fact --

25 THE COURT: But I'm happy to hear from Mr. Goldstein

1 or Ms. Orr if they have something.

2 MR. HUNTER: Well --

3 MR. GOLDSTEIN: Unfortunately, you've caught me
4 [inaudible], Your Honor.

5 THE COURT: Okay. You see my concern?

6 MR. HUNTER: That is -- I think that is a fair
7 concern.

8 THE COURT: I'm going to ask your colleagues across --
9 on the other side the exact same question.

10 MR. HUNTER: Well, and the government can correct me
11 if I'm wrong. Ms. Orr is calling to mind that at the last
12 hearing we had in front of Your Honor on this question the
13 government indicated that they were perfectly capable of
14 proceeding on both theories in the same indictment. And that
15 is the issue, is that --

16 THE COURT: That's why I was going to ask them, too.
17 Yeah, exactly.

18 MR. HUNTER: -- is that -- is that we can't have that,
19 because they will always have that escape hatch as a result.

20 THE COURT: All right.

21 MR. HUNTER: If the government wants to come forward
22 and say, Yes, definitively this is a *quid pro quo* case, it is a
23 bribery case, that is our theory, then that satisfies a large
24 amount of our concern in the bill of particulars, although it
25 does not satisfy the secondary concern, which is if that is --

1 if that allegation is the crux of it, what is the official act?

2 And as I see it, it could be any of Mr. Galindo's previous
3 accounts for it. There certainly is also a theory that it's
4 some kind of a string of official acts. It could be like a cop
5 on the payroll-type theory.

6 But they need to give us a little bit more specificity of
7 that because the bulk of the indictment is setting up each of
8 the individual pieces of what could be a finalized conspiracy
9 to bribe. But it's over a span of months and years. And we're
10 not having all of this coalesce at once.

11 And so it very well could be that the final understanding
12 is different from the understanding at any given particular
13 moment, which leads me to another concern I think we have in
14 the bill of particulars, which is when does this conspiracy
15 end? And I think that -- Judge Ezra has denied our motion to
16 dismiss on the limitations issue. But we have to recognize
17 that all of the substantive acts that formed this
18 understanding, this arrangement, this plan -- and we're going
19 to for the moment assume it is a *quid pro quo* plan because I
20 hope the government will entertain our invitation on that.

21 If that is how it was set up, then this offense is barred
22 by limitations. Its only saving grace would be that it's a
23 continuing offense because it's a conspiracy, and that one of
24 its objectives was to cover up. That's about it.

25 But, Your Honor, at a certain point the conspiracy's

1 objectives are obtained. How long is this thing going to run
2 on? How many \$5,000 payments is Mr. Galindo going to receive
3 for what appears to be a solitary act of forbearance on one
4 occasion, on one vote, for a single contract.

5 THE COURT: Well, I mean, I could assume you keep --
6 let me just ask. It seems like -- I could assume you could
7 keep on getting payments. As long as Farthing's company's
8 getting paid, he's going to get paid. That's the deal. And so
9 that means as long as the payments are going, the conspiracy's
10 still going on.

11 MR. HUNTER: Well --

12 THE COURT: Why wouldn't that be the -- why -- I mean,
13 that sounds like a conspiracy. You don't have to promise to
14 pay right now. You make the conspiracy. You make the
15 agreement. It goes as long as you keep getting payments.

16 MR. HUNTER: Well, for one, we have --

17 THE COURT: If it's the *quid pro quo*.

18 MR. HUNTER: For one, we have a change of companies.

19 THE COURT: Yes. Go ahead.

20 MR. HUNTER: And Mr. Farthing ceases to be involved in
21 this operation at a given point. That's one factor.

22 What I'm saying is, we're going to get to a place in trial
23 where the counting of conspiracies is going to be important.
24 And we may have an argument to be made that the conspiracy that
25 was alleged ceased and that that could be a question of

1 limitations that the jury gets to decide.

2 THE COURT: I see. All right.

3 MR. HUNTER: But if we don't have a more fixed concept
4 of this, on -- going back to *quid pro quo*, going back to
5 whether it's a bribe or a gratuity, going back to what the
6 official act was, we're not going to be able to firmly
7 ascertain when the objectives of the conspiracy were met apart
8 from the *de minimis* allegation that it was continuing.

9 I mean, it is -- it's never ceased to boggle my imagination
10 that the government can take what would otherwise be a
11 limitations-barred offense. And by adding those very small
12 magic words and the numbers 371 next to it, they can keep it
13 running for perpetuity.

14 But since that seems to be the law and that seems to be
15 something that they can get away with, we at least should have
16 an opportunity to put to the jury the question of whether or
17 not they believe beyond a reasonable doubt it's a continued
18 offense. And we have to have a defined set of terms about what
19 the offense is, when it happened, when it was consummated and
20 when its objectives were complete, apart from cover up.

21 THE COURT: One more question for you with regard to
22 that. One of the things in your bill of particulars is to
23 request a whole series of which overt acts show which action?
24 With regard to that, I think we settled at the last hearing
25 there wasn't any dispute that, in fact, different overt acts

1 can be presented at trial than are presented here.

2 So even if you got a bill of particulars that laid all that
3 out, the government is complete with -- as I understand it,
4 completely within their rights to say, You know what? Here's
5 some more overt acts.

6 MR. HUNTER: I think --

7 THE COURT: So how -- why would -- I mean, doesn't
8 seem to me that an overt act bill of particulars is appropriate
9 when you can -- when you're not required -- you're not bound by
10 the ones you have or you could add other ones.

11 MR. HUNTER: If we had a more definite understanding
12 of what the official act and objective were, then I don't think
13 there would be as much of a problem about which official -- or
14 which overt acts are alleged or how many. I think they could
15 list a long litany. A bribe for a particular act in Congress,
16 for example, to be done, it may take many months, many
17 phonecalls, many payments in order to effectuate its objective.

18 But there has to be some clear idea of what are we
19 ultimately trying to accomplish. A lot of this talk, a lot of
20 this information in the grand jury transcript and in Galindo's
21 302, they come across as just sort of a general soured
22 corruption, someone who is just kind of going along to get
23 along. You know, maybe I need something under the table on
24 this.

25 But that's not going to -- that's not going to get us there

1 unless we fully understand what he has to give in exchange,
2 because that's really not clear from the indictment. What
3 is -- what is Galindo giving Mr. Farthing? What is the actual
4 benefit that's received?

5 Let's say he presided over the vote. Okay? He certainly
6 wasn't the only vote. There's -- I mean, to what extent is it
7 actual or perceived? I mean, is impossibility a potential
8 defense that could be raised here? I don't know because I
9 don't know what official act it's claimed that we specifically
10 were paying him to do.

11 THE COURT: I mean, isn't it all in 12(b)? I don't
12 think there's anything else that he did except in 12(b) of the
13 indictment, right? In exchange -- in exchange for -- again,
14 the thing -- for payments and promises of future payments,
15 acting in his official capacity, Galindo presided over the vote
16 and helped Farthing's company negotiate price and secure the
17 R-3 contract in terms favorable to his company.

18 That's what he did. I mean, if he did -- I mean, again,
19 maybe they could argue some overt act, them doing something
20 else, but he says they -- it was -- the object was in exchange
21 for favorable conduct. And then it says that -- and I think
22 that's the only place that he says he did anything in the
23 indictment, unless, of course, I missed something in that -- in
24 that --

25 MR. HUNTER: You haven't, Your Honor. But I think

1 that enumerates it perfectly. If those are the official
2 acts -- and I think those are fairly vague official acts.

3 THE COURT: Yeah. All right.

4 MR. HUNTER: I mean, I'm going to help you get a
5 contract. All right. Well, God only knows what that means.
6 But if that is going to be an acceptable overt act, I mean --
7 or, rather, official act, then we need to have notice of what
8 overt acts were done specific to that official action.

9 THE COURT: All right.

10 MR. HUNTER: And we're not going to get that at
11 present. So, I mean, I think it can be either/or. The
12 government could tell us with more specificity what Galindo did
13 to make this contract obtainable, or they can tell us what
14 Farthing and Uresti did to more definitively secure Galindo's
15 cooperation.

16 THE COURT: Well, so let me say, you've done a very
17 good job arguing this, with a lot of interruptions from your
18 co-counsel. So if there's something else that you need to add,
19 I'm happy to hear it, or if co-counsel needs to say something
20 else before then I hear from Mr. Blackwell.

21 MR. HUNTER: Yes, Your Honor. I think Ms. Orr has
22 something.

23 MS. ORR: A couple of things I wanted to say, Your
24 Honor. And that was that --

25 THE COURT: I'll let both sides argue. You might as

1 well just get it all out.

2 MR. BLACKWELL: It's fine, Your Honor. We don't -- we
3 don't --

4 MS. ORR: I just wanted to --

5 THE COURT: All right. Very well. Just checking with
6 you guys.

7 MS. ORR: -- just wanted to remind the Court that
8 there was one bidder in this contract.

9 THE COURT: "There was one"? I'm sorry.

10 MS. ORR: One bidder.

11 THE COURT: Oh, okay.

12 MS. ORR: A sole bidder.

13 THE COURT: Okay.

14 MS. ORR: That's what makes it somewhat mysterious
15 about what it is that Judge Galindo did that somehow assisted
16 PNA in getting the bid.

17 And the other thing I wanted to say is that the impeachment
18 of Galindo, I guess, could be characterized in some way as a
19 defense. But it's not -- I think we need sufficient overt acts
20 so that we can prepare a defense. So, for example, if the
21 government were to say that we have -- you know, this
22 particular amount was agreed upon on this particular day or
23 after this meeting, and if, in fact, the contract had already
24 been agreed to by BOP at that time, then we would know, well,
25 that -- we've got a good defense against that, or my client

1 wasn't at that meeting or -- you know, so it's really wanting
2 to put on a real substantive defense that we need the bill of
3 particulars to help us with as well.

4 THE COURT: All right. Very well.

5 All right. Mr. Goldstein, anything else that you wanted to
6 add before I get to hear from the other side?

7 MR. GOLDSTEIN: Out of respect for the able argument I
8 just heard and able counsel for the government and particularly
9 for the Court, I'll abstain.

10 THE COURT: All right. Very well.

11 Mr. Blackwell, let me hear from you or Mr. O'Connell. And,
12 again, I'm quite happy to hear from both of y'all if you
13 believe it's appropriate. You know what? I'm trying to get to
14 the bottom of it. I'm happy --

15 MR. BLACKWELL: It's fine, Your Honor.

16 THE COURT: All right.

17 MR. BLACKWELL: You're just going to hear from me.

18 THE COURT: All right.

19 MR. BLACKWELL: But we have -- we have -- we have no
20 objections to any of that.

21 THE COURT: All right. Very well.

22 MR. BLACKWELL: That's completely fine.

23 Your Honor, just as a matter -- bill of particular's not
24 used for discovery mechanism, which is basically everything
25 that they've argued -- is to try to use it as a discovery

1 mechanism. It's not the purpose -- there's a specific case
2 that say a bill of particulars not to be used to discover
3 overt acts. That law is firmly established, which is what they
4 basically just argued.

5 In terms of legal theories, overt -- bill of particulars
6 are not to be used to discover legal theories, which is -- the
7 crux of their argument is which legal theory that the
8 United States is presenting under. And the answer is both.
9 Both are -- both are charged in the indictment, Your Honor.
10 And I -- and I guess we'll just cut through what --

11 THE COURT: Because they -- I noted that the
12 indictment -- as Judge Ezra did, that the indictment, I believe
13 paragraph 10, does cite both -- the statutory language from
14 both elements. But that object, it sounded to me like in
15 exchange for --

16 MR. BLACKWELL: And I understand in terms of the
17 object. But you've got to look at the overall charge, Your
18 Honor. And that's going up into the conspiracy, which is --
19 you know, one thing that they highlighted in their motion,
20 which I know they didn't argue now, and so I'm not going to
21 hold them to it, is they think the difference between a
22 gratuity and a bribery is the timing of the payment, which is
23 not --

24 THE COURT: The Court's resolved that.

25 MR. BLACKWELL: The Court --

1 THE COURT: It's the intent -- it's the intent to make
2 them -- to get them to do this or to reward them for doing it.

3 MR. BLACKWELL: That's exactly right.

4 THE COURT: Very well.

5 MR. BLACKWELL: And you can have a reward in exchange
6 for action taken.

7 THE COURT: Yes.

8 MR. BLACKWELL: So that's why you have things -- I
9 mean, the Court has already dealt with their argument about
10 constructive amendment. And that's why you have a unanimity of
11 theory. And the statute allows for charging for multiple
12 criminal acts under the statute.

13 We do not have to elect. We can present the evidence to
14 the jury, and the jury can decide which criminal act has been
15 violated by the actions of the evidence that we present. And
16 that's really the crux of what their argument is, is, you know,
17 trying to get the government to A) give a legal -- very
18 detailed exposition of its legal theories, which I would even
19 argue this is not just a boilerplate indictment. It is a
20 speaking indictment. It lays things out with specificity,
21 which Judge Ezra identified. In fact, he called it a detailed
22 indictment in his order.

23 And so the purpose of the bill of particulars and what they
24 claim that they need a bill of particulars for in their motion
25 is, one, to prevent against double jeopardy, which the district

1 court has already decided --

2 THE COURT: Yeah. I'm not -- okay. Look, I can slow
3 that part down.

4 MR. BLACKWELL: Sure.

5 THE COURT: This isn't the sufficiency of the
6 indictment. It isn't a due process claim at this stage. It is
7 the Sixth Amendment right to apprise them of their defense to
8 avoid substantial prejudice. That's the issue that the Court's
9 addressing, because the motion -- the order dismissing --
10 denying the motion to dismiss the indictment deals with the
11 question of whether the indictment is sufficient, whether the
12 grand jury returned the proper indictment, matters like that.

13 MR. BLACKWELL: But the Court --

14 THE COURT: But that -- so it's just the
15 defense question in my mind.

16 MR. BLACKWELL: But, Your Honor, in that -- in that
17 order the Court also said there's sufficient information to
18 provide -- to prevent undue surprise in the preparation of
19 their defense. So I would argue that that issue's been taken
20 care of already by the Court's order.

21 But the long and short of it is what they're trying to get
22 is to say the United States has to pick. The United States --
23 which would -- if that were the case, then that would do away
24 with the entire body of law that allows the United States to
25 plead conjunctively and to prove disjunctively.

1 If we had to elect prior to trial, then that would be -- we
2 wouldn't be able to do that anymore. There would be no need
3 for unanimity of theory instruction and things like that. We
4 are allowed to proceed under different legal theories. It's
5 charged.

6 The statute criminalizes certain actions, whether you
7 are -- you know, solicit, demand, receive, intended to be
8 influenced or rewarded. Okay. That's -- you know, influenced,
9 rewarded, those are two ways that you can violate the statute.
10 Bribery, gratuity, okay, in kind of short terms.

11 Both of them are charged in this indictment, Your Honor,
12 under the -- under the language that we track the statute. And
13 they want the United States to have to say that we're basically
14 abandoning one element of that -- one aspect of the way that
15 the indictment is charged.

16 THE COURT: Yeah.

17 MR. BLACKWELL: First off, that's not a proper --
18 that's not a valid purpose of a bill of particulars, which the
19 Court's already expressly says it is not -- to provide the
20 United States' legal theories. But secondly, we're not
21 required to do that because we're allowed to plead. And the
22 Court brought -- you know, Judge Ezra dealt with the
23 constructive amendment issue and the conjunctive pleading in
24 his order.

25 So I understand what the Court is saying in terms of the

1 object and -- but if you take a step back, you can still have a
2 gratuity which is done in exchange for certain actions as a
3 reward. The difference is, the bribery has a specific intent
4 which the gratuity is not going to have. In some ways gratuity
5 is actually a lesser included offense of a bribery. And, in
6 fact, there's different -- potentially different sentencing
7 status that -- if you look at the federal gratuity versus
8 federal bribery, they're sentenced under --

9 THE COURT: That's what SunGrower was all about.

10 MR. BLACKWELL: That's right. They're sentenced under
11 different things. So I don't necessarily agree with the Court,
12 respectfully, that the object -- the language "in exchange for"
13 is dispositive in terms of making us select a certain theory
14 that the jury could not find.

15 In fact -- and, Your Honor, I would go a step further. I
16 believe that, given the way we've charged this crime being
17 committed in multiple ways -- and I want to be very clear. I'm
18 not saying we have not charged a bribery. We have.

19 THE COURT: Judge found you did.

20 MR. BLACKWELL: That's right. So I don't want to -- I
21 don't want to be -- I'm not trying to, you know, be cute or tap
22 dance or be legalistic. We charged a bribery. We just also
23 charged a gratuity, which we are allowed to do.

24 So it's both in there. Both of the ways that the statute
25 can be violated are charged in this indictment. And we are not

1 required to select because the law clearly says we can plead
2 this way. We can go forward. We can submit our proof to the
3 jury. As long as the jury unanimously agrees that the statute
4 was violated in one of the ways, he'll be found guilty. And
5 that question will be put to the jury as to, Do you unanimously
6 agree that the statute was done --

7 The statute can be violated in the facts of this case both
8 ways. It could be both a reward for certain actions and a *quid*
9 *pro quo*. And let me -- I'm going to do a little *non sequitur*,
10 Judge, just to -- just to clear something up real quick because
11 it tickled my memory.

12 THE COURT: That's fine.

13 MR. BLACKWELL: A *quid pro quo* in a bribery, the law
14 does not require that the official taking the action do
15 anything different. And, in fact, it can be actions that they
16 would have otherwise taken. It is not -- it is very clearly
17 not a defense to say that, I would not have taken this action
18 but for the bribe. So I just want to -- I know that's kind of
19 neither here nor there, but that was something that was raised
20 before.

21 THE COURT: Doesn't have to be but for, but there has
22 to be an influence, right? I mean, in other words, you might
23 have done the same thing, but it's the corrupting influence --

24 MR. BLACKWELL: Well, it's a corrupting influence,
25 but --

1 THE COURT: Right.

2 MR. BLACKWELL: -- it's not that it caused -- it's not
3 that they would have taken --

4 THE COURT: It doesn't have to cause it. Yeah.

5 MR. BLACKWELL: -- that action no matter what.

6 THE COURT: Yeah.

7 MR. BLACKWELL: That's not --

8 THE COURT: Correct.

9 MR. BLACKWELL: That's not --

10 THE COURT: I understand. I understand.

11 MR. BLACKWELL: I just -- and I guess it's not germane
12 necessarily to this, but it was said --

13 THE COURT: No. But I understand what you're saying.
14 Go ahead.

15 MR. BLACKWELL: -- and I wanted to make sure that that
16 was clear.

17 But, Your Honor, this all comes down to two things they're
18 asking for. One is discovery. They want to know, you know,
19 additional overt acts and things like that. And I think we've
20 dealt with that.

21 But secondly, and probably the most -- the thing this
22 Court's considering and their strongest -- not their strongest
23 argument but the strongest thing they're advocating for, I
24 guess, is they want to know -- they want to lock the
25 United States into a legal theory. And that's what they want

1 to do. They want to -- they want to lock us into a legal
2 theory.

3 If this indictment did not have the language that says, you
4 know -- if the indictment stopped at "intending to be
5 influenced" and did not have "or rewarded in connection with a
6 transaction," we would be locked in. There is no question.

7 Conversely, if it did not have the "intending to be
8 influenced" language and just said "to be rewarded in
9 connection," we would be locked in that way. Okay? But the
10 indictment does not say that.

11 What has been presented and grand jury's returned tracks
12 the language of the indictment, but it says that this
13 indictment -- violated several ways. And that's how it's been
14 charged. And at no time -- we're allowed to present that to
15 the jury, Your Honor. And a bill of particulars saying which
16 one it is, is an attempt to cut -- to cut one of those two
17 things off.

18 THE COURT: Well, let me ask you with regard to the
19 discovery question, you noted that a bill of particulars isn't
20 a vehicle for discovery. However, the providing of discovery
21 can make a bill of particulars inappropriate.

22 MR. BLACKWELL: Right.

23 THE COURT: I had asked the defense counsel the
24 question with regard to what exactly were these statements from
25 Judge Galindo that were being relied upon to say, Hey, there's

1 a problem here? Let me ask you the flip side of that.

2 MR. BLACKWELL: Sure.

3 THE COURT: I know you're not required to disclose
4 Jencks material in advance. Are there some more statements
5 that are going to be coming out to where this will get raised
6 again in a different context, or have you pretty much given the
7 discovery of what you're intending to present at trial, to the
8 extent you can tell. And you're not required to. But you see
9 why I'm asking.

10 MR. BLACKWELL: No, no, no, no, no. I understand why
11 you're asking, Your Honor. I have no problems answering that
12 question. In fact, I've got it number two circled here --

13 THE COURT: Oh, all right.

14 MR. BLACKWELL: -- that I meant to -- I meant to
15 address. We have given Jencks statements. Now, additional
16 interviews are being done.

17 THE COURT: Sure.

18 MR. BLACKWELL: As those interviews are being done,
19 we're preparing --

20 THE COURT: You're willing to supplement.

21 MR. BLACKWELL: -- 302s and --

22 THE COURT: Okay.

23 MR. BLACKWELL: -- turning those over.

24 THE COURT: All right.

25 MR. BLACKWELL: We're sending out some tomorrow for

1 three witness interviews, in fact, that have recently been
2 done.

3 THE COURT: All right.

4 MR. BLACKWELL: But in terms of the 302 reports that
5 have been done, those have all been turned over. That
6 includes -- so early production of Jencks. As the Court knows,
7 even grand jury information from Agent Giese has -- Mr. Galindo
8 participated in two interviews. One was recorded. That has
9 been turned over, the very first one.

10 THE COURT: Is that transcribed or just a recording?

11 MR. BLACKWELL: Just a recording. But a 302 was done
12 as well, so the summary of it.

13 THE COURT: Okay. That's fine. Go ahead.

14 MR. BLACKWELL: That was the first interview before he
15 was cooperating. And the second interview was not recorded,
16 but there's a lengthy 302 detailing that.

17 THE COURT: Got you.

18 MR. BLACKWELL: We've given over bank records,
19 financial records. We've given them records from GEO, which
20 was running the prison, basically doing the administrative
21 functions. We've given records from Bureau of Prisons. We've
22 given Reeves County records. We've given records that we
23 obtained from CCH, which is the successor company from PNA,
24 records from the grand jury that have been obtained, records
25 from a search warrant.

1 We've engaged in as close to open file discovery as we're
2 really able to. We've given -- we've got -- there's a
3 cooperator -- not a cooperator. That's the wrong word. That'd
4 be Galindo. A confidential source who provided some
5 information. And we've given all those records, including
6 payment records to that confidential source. We've --

7 THE COURT: All right. Are there any additional
8 documents or evidence from Judge Galindo himself that you --
9 that y'all have? Do you think that you're going to be
10 disclosing at a later time?

11 MR. BLACKWELL: Not -- we've -- he has given us
12 records. He's given us his email records, and he's given us
13 documents that he had. We've disclosed all that.

14 THE COURT: All right. The reason I'm asking is the
15 defense is real -- one of their arguments was, Look, what
16 exactly did Galindo do?

17 MR. BLACKWELL: Right.

18 THE COURT: Have you given them everything that you
19 know?

20 MR. BLACKWELL: Everything --

21 THE COURT: It sounds like you've given them
22 everything you know about that.

23 MR. BLACKWELL: Everything that Judge -- everything
24 that Mr. Galindo provided to us has been provided to the
25 defense.

1 THE COURT: All right. Very well.

2 MR. BLACKWELL: And then the 302s of his interviews
3 have been provided as well.

4 THE COURT: Then I had one other question. But, of
5 course, I'm happy to hear any argument you or Mr. O'Connell
6 would like to make. But I had a question -- if you'd like to
7 respond to the limitations issue that was raised by the
8 defense, this question of whether -- if Judge Galindo's actions
9 were a long time ago, that -- how is this so -- continuing a
10 conspiracy or how could they defend themselves against -- or
11 prepare a defense to say, Hey, this is outside the statute of
12 limitations? And I'm happy to hear your response.

13 MR. BLACKWELL: Well, the -- sure. First, statute of
14 limitations is an affirmative defense. We've claimed a
15 conspiracy that has run within the statute of limitations, and
16 provided overt acts that go within the statute of limitations,
17 specifically the payments that relate to, you know, the
18 agreements that were given.

19 So basically -- I mean, it's no secret that the way that
20 the payments were done was through the contract with -- between
21 BOP and PNA. Well, not -- excuse me. That's wrong. I'm
22 sorry -- BOP and Reeves County to run the R-3 detention
23 center --

24 THE COURT: Yeah.

25 MR. BLACKWELL: -- was essentially a ten-year

1 contract. It was -- it was -- there was a term. But then, you
2 know, several terms after that, a two-year. So essentially a
3 two-year -- a ten-year contract from 2007, so to run to 2017.

4 Contemporaneous with that, Carlos Uresti was given a -- you
5 know, we put in quotes -- "consulting agreement." He was paid
6 money from PNA. Those payments continued with the successor
7 companies. And Mr. Uresti then funneled half of that money,
8 minus a deduction for rent for an office that was never used,
9 to Mr. Galindo.

10 Those payments, you know, in exchange for the actions that
11 were taken, were done well into the statute of limitations. So
12 the conspiracy continues, like you said, until it ends. And
13 when you're talking statute of limitations, a defendant has to
14 show affirmatively that they withdrew from the conspiracy.

15 So that's something -- I mean, I assume it's something we
16 could put to the jury. I mean, they're going to probably argue
17 that he -- I don't know what they're going to argue. But, you
18 know, it sounds like they may want to try to put that to the
19 jury. But -- and they raised that with the Court, with
20 Judge Ezra.

21 But, you know, the indictment has charged actions within
22 the scope of the statute of limitations. There were payments
23 made to Uresti, which turned around and paid -- made the
24 payments to Galindo. This sounds like an argument for a jury
25 basically to decide whether those were, in fact, criminal, you

1 know, actions as part of the conspiracy, whether the conspiracy
2 continued or whether it ended at some point. But it's
3 simply -- you know, it'd be a question for the jury.

4 THE COURT: All right. Very well.

5 Anything else?

6 MR. BLACKWELL: Is that -- unless you have additional
7 questions, Your Honor.

8 THE COURT: No. That was -- that was fine. Thank
9 you.

10 Let me hear from -- it looks like the defense wants to have
11 a brief rebuttal.

12 MR. HUNTER: Briefly, Your Honor. Yes.

13 THE COURT: Yeah. Sure.

14 MR. HUNTER: The first thing I just want to emphasize
15 is that while certainly we can't use a bill of particulars to
16 make the government commit to a legal theory, the goal of the
17 bill of particulars is for us to understand what we are charged
18 with in an exact enough way that we can present our defenses.

19 And the big elephant in the room here is that if the
20 government has this ability to use a gratuity as a theory that
21 it can proceed with, it has a diminished burden of proof. It
22 has to prove a much lesser intent than what they have to
23 accomplish if they're going to prove a bribe.

24 And so what it really boils down to is the statute
25 contemplates both, according to Judge Ezra, according to the

1 majority of the circuits. We contest that. But the reality
2 is, we have to live in a world where the statute contemplates
3 both actions being this crime.

4 That does not mean that one individual act must be both or
5 can be both at any given particular moment. In fact, the
6 intents are somewhat mutually exclusive. If you were intending
7 to influence someone and if the same conduct could be both a
8 bribe or a gratuity in a particular circumstance -- and the
9 difference is the subjective state of mind of the actor. And
10 that's going to be something the jury decides based on the
11 objective evidence surrounding the event.

12 If I'm intending to influence someone, I am, by definition,
13 not going to be rewarding them for an act that I appreciate. I
14 don't appreciate them at all. I want them to be my agent. I
15 mean, the Foreign Corrupt Trade Practices Act defines this
16 corrupt intent to mean essentially that the actor -- the
17 bribee's will is no longer the bribee's will. He may be not --
18 it's not like he's so overborn that he must do it. But he's
19 not doing it for any personal motivations of his own thought.
20 He's doing it because of the briber's intent. That is mutually
21 exclusive to the *mens rea* that you would need for a true
22 gratuity.

23 THE COURT: Okay. I have to press you on that. It's
24 an interesting point. But from the perspective of your client,
25 I don't see why that would be true. And the reason is, is it

1 seems to me that you can say from your client's intent, it's --
2 I either want to influence him to do it, or I want to reward
3 him to do it. And it's the other guy's intent to decide
4 whether it was influencing him or not.

5 If he says, Ah, I didn't even think about that, I just was
6 doing what I was going to do, but I was happy to take the
7 reward, then it plays out of the gratuity. So, I mean, it
8 seems to me that your client -- your client in this context,
9 Mr. Farthing, that -- the person who's bribing or rewarding
10 could have an intent to do both at the same time. It just
11 turns out what the responsive intent is, just like in a
12 contract. Why wouldn't that be the case here? That's why I --
13 and maybe I'm misunderstanding the law, and I often do.

14 MR. HUNTER: Well, no, Your Honor. I don't
15 necessarily agree with the Court's position, but even if the
16 Court was right, this is a 371 conspiracy.

17 THE COURT: Fair enough.

18 MR. HUNTER: We have to presume that all three of
19 these actors had a shared intent; that they were all operating
20 under the same purpose and belief. And if we're assuming that
21 that kind of high mind of criminality exists here, then we need
22 to -- we need to be able to say what the specific intent was,
23 for two reasons, both for the bribery to survive and for what
24 our agreement may be. We need to know what that intent was.

25 And the decision to reward someone is an affirmation and an

1 approval of their act. And it is perhaps a recognition of the
2 fact that there were unspoken influences between the two
3 individuals prior.

4 Our argument in the motion to dismiss was not solely that
5 the time is the definitive factor. But I think time is one of
6 the clearest indicators about whether one is something or the
7 other. But certainly, it is about the overall intention of the
8 parties. But that difference is mutually exclusive. But being
9 that it's a conspiracy, I think the specific intent of all
10 actors has to be the same, and it's got to have to be one or
11 the other.

12 And so the government wants to hang on to this, because
13 despite all of the claims about, We have *quid pro quo*, We have
14 *quid pro quo*, they've got a messy cooperating codefendant with
15 a messy set of stories that he's told over a long period of
16 time. They are not confident that they're going to get a *quid*
17 *pro quo*. They need that gratuity to be in there if they are
18 going to be able to survive. They have to present it. They
19 have to tell that story as their first shot because there's way
20 too much about *quid pro quo* in the past for them to ignore.
21 But they need that out.

22 And why on earth would we say that just because 666 allows
23 for us to have both possible acts as a crime -- why would we
24 say that they are -- they are the same -- they can be charged
25 in the same count? I mean, that alone is an interesting

1 question. Can I both -- can I both bribe and engage in illegal
2 gratuity on the exact same facts?

3 THE COURT: Well, conspiracies can have multiple
4 illegal objects. That's always been the case.

5 MR. HUNTER: Well, that's certainly true.

6 THE COURT: All right.

7 MR. HUNTER: But let's posit that it was a substitute
8 for a moment, and let's say there was no 371. Would they be
9 able to present that as -- would that be a duplicitous
10 indictment or not?

11 THE COURT: I see what you're saying. Yeah.

12 MR. HUNTER: I don't -- I think the answer would be
13 no. If, in fact, we're going to have a unified theory that
14 bribes and gratuities are both covered by 666, why on earth
15 would we allow the jury to convict of both in a single count?

16 THE COURT: All right. Very well.

17 MR. HUNTER: Briefly as to the limitations argument,
18 Your Honor, again, why the payment was made is going to make a
19 difference in our jury argument about how long the conspiracy
20 ran.

21 And just -- let's just take it as this. We can say that
22 someone would reward a person for a long term of service as
23 being very friendly and favorable to their company by perhaps
24 giving them employment and making that run over a number of
25 years. That might sell to a jury.

1 But the idea that a *quid pro quo* on one contract would
2 run -- is an indefinite guarantee of payments is a completely
3 different argument that we would be able to make to this jury.
4 And we need to know, because it's going to affect how we assert
5 that affirmative defense and whether we even can.

6 THE COURT: All right.

7 MR. HUNTER: So I'd ask the Court to just consider
8 that.

9 THE COURT: All right. Very well.

10 MR. GOLDSTEIN: Your Honor, I know I can't --

11 THE COURT: I didn't think you could actually stand
12 it. I kind of expected eventually, Mr. Goldstein, you would
13 say something. Then I'll -- if necessary, I'll hear something
14 else from the prosecution.

15 MR. GOLDSTEIN: Without stepping on government
16 counsel's point, two things that just come to my mind. One,
17 while I found it interesting -- and I understand that the
18 government could change their theory in the middle of a case,
19 and there would be little we could do about it. But one of the
20 reasons for Stirone and the bill of particulars is that we
21 ought to at least be entitled to understand what the grand jury
22 indicted our client for.

23 And while I agree with the Court about the moving target
24 with respect to intent, I think the Supreme Court in *Elonis* --
25 although it was a totally different issue. It was, I think, a

1 terroristic threats case. But they talk about the intent that
2 we need to focus on in the criminal trial is proof beyond a
3 reasonable doubt of the culpable mental state of the party
4 charged.

5 You know, while it is true that the person could both
6 appreciate a reward or a bribe in advance of that act, it is
7 the intent, that it has to be something that has a corrupt
8 purpose. And it's Mr. Farthing's intent that is at issue. And
9 that is what the grand jury has charged.

10 And I am -- I was intrigued by the Court's focus on
11 paragraph 11 on Page 3 as the object, that at least we ought to
12 get a ruling that that is the object that they have alleged,
13 that the grand jury intended, and that we can rely upon that as
14 being what they are expected and will be required to prove
15 beyond a reasonable doubt, Your Honor.

16 THE COURT: All right. Very well. Thank you.

17 (At the bench off the record)

18 (Open court)

19 THE COURT: All right. I appreciate the parties'
20 presentations. Extremely interesting. I'm happy to hear more,
21 Mr. Blackwell, but I think I know where I am, unless there's
22 something you wanted to add. I see you looking at me. I don't
23 want to go into a ruling without hearing from you, sir.

24 MR. BLACKWELL: It depends on your ruling as to
25 whether I want to add things or not, Your Honor.

1 THE COURT: That's always the case.

2 MR. GOLDSTEIN: We'll join in that.

3 MR. BLACKWELL: I just want to say this in terms of
4 the legal theory, that statutes can be violated multiple ways.
5 And ultimately when they say the government has the luxury of
6 picking which legal theory, I mean, we're allowed to present a
7 series of facts and evidence to the jury and to say, Jury, this
8 is the way these statutes can be violated.

9 And then the jury, as long as they prove beyond -- you
10 know, decide unanimously beyond a reasonable doubt, they get --
11 they can elect which way the statute was picked. And they want
12 to cut that off and say that -- no, that you're not allowed to
13 do that. The law specifically allows for this type of pleading
14 through Fifth Circuit precedent. The Court's already --
15 Judge Ezra's already recognized that we're doing it. We've
16 been, you know, upfront about how we're doing it.

17 And so the whole basis of what they're trying to do to
18 basically cut off a way that the statute could be violated,
19 that the jury could look at and say, based upon these facts,
20 the statute was violated this way. As long as they unanimously
21 agree and are charged appropriately, that is -- those improper
22 use for a bill of particulars is not what the bill of
23 particulars is designed to do, but also would be improper and
24 do away with the entire concept of disjunctive pleadings.

25 THE COURT: All right.

1 MR. BLACKWELL: That's all I wanted to add. Thank
2 you.

3 THE COURT: All right. Thank you.

4 All right. Again, as I was saying, extremely interesting
5 issue. I appreciate the parties' presentations on it. I think
6 the parties know that I've considered the issue rather
7 carefully in preparation for this hearing and thought about
8 this a little bit.

9 This motion for bill of particulars that's in front of me
10 will be denied as moot in part, denied in part and denied
11 without prejudice in part. And let me explain exactly what I
12 mean.

13 With regard to the issues addressed by Judge Ezra in his
14 motion to dismiss, it's moot. He's already resolved those
15 issues. A very important one of those issues is whether 18 USC
16 666 can be -- includes both a bribery crime and a gratuity
17 crime. He's resolved that issue for purposes of this trial. I
18 note for the record the defense objection to that, so it's
19 preserved for future hearings if there are any on that matter.

20 With regard to the question of whether this particular
21 indictment charges a *quid pro quo* sufficient to apprise the
22 defendants of the crime, I believe Judge Ezra has also resolved
23 that in his motion. And to the extent he hasn't, I find that
24 it's sufficient to do that.

25 With regard to the question of the bill of particulars in

1 general as to other matters, I'm denying it in part because I
2 don't believe a bill of particulars is a place to get overt
3 acts. I think that those can change. And that's -- the
4 government's entitled to change them. And so for that reason a
5 bill of particulars is not appropriate on that matter.

6 I also believe that the government has engaged in -- has
7 provided sufficient discovery in this case to protect against
8 any surprise at trial as to the facts that will be presented at
9 trial.

10 Why is it denied in part without prejudice? It's denied
11 without prejudice to a unanimity jury instruction request, as
12 mentioned by the government. But it's also denied without
13 prejudice to two other arguments that I see. And I want to be
14 clear about what my view is. Though, the parties are going to
15 have to resolve this with Judge Ezra.

16 I read the object of that conspiracy as a *quid pro quo*. It
17 doesn't say that he's going to get payments as a result of
18 official action. It says he's getting payments in exchange for
19 favorable action. "In exchange for" -- that's my
20 understanding. I'm just making the record. And other people
21 might see it otherwise. That's what *quid pro quo* means. So
22 that sounds to me like a bribery claim.

23 And to the extent that this is a gratuity -- evidence is
24 presented to the jury, the government has the right to do this,
25 and seeks a unanimity theory, it may be that the defense will

1 seek a motion to dismiss because the indictment's been
2 constructively amended.

3 I know that Judge has somewhat addressed that in his order.
4 But I reread the order this morning. I see him saying it can
5 charge either a gratuity or a bribery, and it has charged a
6 bribery. I don't read in this opinion that he says it has
7 charged the gratuity claim. That's what I read. So I think
8 that issue is still out there for the judge to decide.

9 Also, I believe that this matter may be appropriate to
10 address at the pretrial conference by way of a motion in limine
11 one more time so that the judge is fully apprized of what this
12 problem's going to be at trial if the government goes ahead and
13 seeks to put a gratuity case before the jury. That could be a
14 motion in limine allowing gratuity evidence in the absence of
15 bribery claims, or a motion in limine trying to exclude that
16 evidence. So to that extent the motion is denied without
17 prejudice.

18 So that's the Court's ruling. It's going to be a very
19 short written ruling. I hope that that oral ruling is clear
20 enough for the parties. And I'm happy to clarify if anyone has
21 a question. Of course I'll start with the government.

22 MR. BLACKWELL: No, Your Honor.

23 THE COURT: All right. Any question as to the Court's
24 ruling from the defense?

25 MR. HUNTER: No, Your Honor.

1 THE COURT: All right. Very well.

2 Now if we could turn to two matters. One is this question
3 about the jury selection in the case. I have -- Mr. Watts, if
4 you'd come forward so I can hear from you, I'd appreciate it.
5 I understand that the parties have consented to me doing the
6 jury selection. And that's great. Happy to do it. I don't
7 know how many jurors we're going to get for the selection yet.
8 I think the courtroom deputy for Judge Ezra is working on that
9 right now.

10 I understand that a questionnaire, a little bit more
11 extensive than the normal questionnaire, has already been sent
12 out to the jury panel for that day. It's my intent to allow
13 the parties to have those jury questionnaires once the panel
14 appears because some people may not appear for court, and that
15 sometimes happens. So you'll have them that morning before you
16 have to -- have jury selection.

17 It's my intention to allow the parties to engage in
18 attorney voir dire, which I know other judges sometimes don't
19 do, but I always do. I believe that particularly defense but
20 also the government has a right to talk to the jurors before
21 they decide who's going to decide their case.

22 My general rule is to -- is 20 minutes per side for that.
23 But, of course, with two defendants, I give both defendants 20
24 minutes. I will hear any objection from the government. If
25 they want some more time, I'm happy to consider it. And if the

1 defense wishes more time than 20 minutes per defendant, I'm
2 happy to consider that as well. But that's my general rule.

3 My experience has been that after an hour of attorney voir
4 dire, there's not anything else to find out about the jury.
5 Instead, there's a danger that the jury will be influenced by
6 the voir dire, which is not what it's for. That's my general
7 rule, but I will happily hear any arguments the parties would
8 like to make.

9 One other matter I wanted to mention, and then I want to
10 hear from the parties. I have had demonstrative exhibits or
11 PowerPoints presented to the jury during -- the prospective
12 jury for voir dire. Those things are going to need to be
13 disclosed to the Court and to the other side by the time of the
14 pretrial conference. I've had a couple of times where things
15 were disclosed at trial, one time a PowerPoint that didn't
16 work, one time cartoon pictures of the defendant as a criminal.
17 I really don't want things like that. I want to know in
18 advance what we have, so if there are any issues, we can have
19 all of that decided before the panel is brought in.

20 Last thing I should mention, many attorneys like to ask
21 questions on a scale of one to ten. I don't allow it. And the
22 reason I don't allow those sorts of questions to the
23 prospective jurors is I find it tends to confuse them more than
24 to elucidate what their views are.

25 So those are my general views. With that in mind, let me

1 hear from all the parties as -- if there's anything they wanted
2 to know or by way of clarification. Of course, I'll start with
3 the government.

4 MR. BLACKWELL: I have been through voir dire fairly
5 recently with you, Your Honor, as you know. And so I don't --
6 I don't think I have any questions. We would just, you know,
7 continue to urge that questions that go on the scale of
8 advocacy not be allowed. That's the crux of the United States'
9 concern.

10 But that's -- other than that, Your Honor, if --

11 THE COURT: Of course.

12 MR. BLACKWELL: Twenty minutes should be fine. But,
13 you know, as you know, sometimes questionnaires -- and if
14 there's a need for more time, we'll probably raise it the day
15 of based upon answers or based upon a questionnaire --

16 THE COURT: And I'm happy --

17 MR. BLACKWELL: -- or something like that. So --
18 yeah.

19 THE COURT: -- always happy to consider that, sir, of
20 course.

21 MR. BLACKWELL: So that's -- you know, issues that
22 come up -- but otherwise, Your Honor, we don't A) have any
23 objection to you conducting jury selection, obviously.

24 THE COURT: All right.

25 MR. BLACKWELL: And we don't have any questions at

1 this time.

2 THE COURT: All right. Very well.

3 Mr. Watts, happy to hear from you, sir.

4 MR. WATTS: Yes, sir. I'm trying to remember what
5 happened last time. And I think -- because I couldn't be
6 there, I didn't sit in and see how long it took. But I recall
7 being told that basically your goal was, we need this jury
8 seated in one day. And I think that's an admirable goal, and
9 we like that.

10 But we would ask for leave -- for 45 minutes a side. This
11 is a case with substantial pretrial publicity, particularly
12 with the previous case. It's going to take a while to get
13 through those issues. I can assure the Court that in the last
14 30 years of practicing law, I've never done a voir dire where I
15 didn't start it by saying, It's now 11:00, and the bad news is
16 you have to answer questions from me. The good news is I'll
17 sit down by 12:00, and promise them, first point, it's going to
18 be 45 minutes.

19 But I think in this particular case, given, you know, the
20 continued presence of my friend from the San Antonio
21 Express-News back there, which is fine, the bottom line is,
22 there's a lot to go through in terms of juror attitudes. And I
23 don't think you can do that in an appreciable manner in 20
24 minutes. I think 45 would be sufficient. We would humbly ask
25 the Court for that, with the commitment that nobody in here

1 wants a situation where we're expending more than a day of the
2 Court's time to select this jury.

3 THE COURT: All right. Well, that's denied without
4 prejudice at this time. But I will reconsider it. I'm going
5 to see exactly what the -- questionnaires come back and exactly
6 what the publicity looks like at that time.

7 MR. WATTS: Sure.

8 THE COURT: Sometimes that can affect the Court. And
9 I will be happy to hear from the parties at that time.

10 MR. WATTS: Thank you.

11 THE COURT: I'm going to try to make the decision at
12 that time.

13 Mr. Goldstein, anything on this issue on behalf of
14 Mr. Farthing?

15 MR. GOLDSTEIN: Briefly, Your Honor. We concur and
16 will abide by the Court's, I think, very reasonable rules. And
17 I also appreciate the Court's understanding -- you've tried a
18 lot of cases -- of the desire by counsel to engage in attorney
19 voir dire. And we would join in the request for 45 minutes.

20 THE COURT: Sure. Noted.

21 MR. GOLDSTEIN: With regard to questionnaires, would
22 it be possible for us to see the questionnaire in advance, with
23 an eye towards we may want to submit a questionnaire and ask
24 the Court for leave to do that of our own, depending on what
25 the questionnaire is that the Court plans. And I --

1 THE COURT: I am pretty sure I can get you guys a copy
2 of the blank questionnaire so you can see what has been asked.

3 MR. GOLDSTEIN: Thank you.

4 THE COURT: I will tell you I expect that the judge
5 is not -- Judge Ezra will not allow any additional
6 questionnaire, having been down this road with him twice in
7 recent year -- in recent months. But at least that would
8 apprise you of what -- to know what's in there so that you can
9 then present your proposed questions as to things that follow
10 from that or things that maybe aren't covered.

11 And, oh, I forgot to mention, Mr. Goldstein -- thank you
12 for reminding me -- what I plan to do is, right before I bring
13 the panel in, I will go through all the proposed voir dire of
14 all the parties and say, I'm asking these. You guys can ask
15 these. And you can't ask -- no one's asking these, so that
16 everybody knows exactly what we're asking. It addresses this
17 question of advocacy that Mr. Blackwell raised. But it also
18 gets you to know exactly what things I'm going to cover and
19 what things y'all may need to cover.

20 After I've gone through all of those, that may be a point
21 at which you want to ask for more time or may need to in light
22 of the questions that I ask you to ask. Do you understand,
23 Mr. Goldstein?

24 MR. GOLDSTEIN: I do, Your Honor.

25 THE COURT: Mr. Watts, I see you standing up.

1 MR. WATTS: Just one other thing.

2 THE COURT: Yeah.

3 MR. WATTS: It may be a significant timesaver. If the
4 Court has the questionnaires back by Friday before the --

5 THE COURT: I don't -- I think --

6 MR. WATTS: And I'm not talking about giving them out.
7 I'm talking about getting access, so that you've got --

8 THE COURT: I'll find out.

9 MR. WATTS: We can do a lot of honing of voir dire by
10 having a couple of hours with the questionnaires three days
11 before we do it. And I certainly understand --

12 THE COURT: I don't know exactly how they get --

13 MR. WATTS: -- the point of not making photocopies --

14 THE COURT: Well, and I don't know exactly how they
15 get back to us. I'll find out.

16 MR. WATTS: Okay. Very good. Thank you.

17 MR. GOLDSTEIN: Lastly, Your Honor, in terms of time,
18 given the amount of publicity this case and individuals have
19 received, it may be that we're going to be asking the Court for
20 individual voir dire of certain members outside of the hearing
21 and presence of the others in order not to contaminate the
22 remaining jurors. And I would -- my experience is that in
23 cases like this there may be instances where we're going to --
24 I wanted to at least alert the Court that we'll be asking --

25 THE COURT: I should mention what my practice is with

1 regard to that, is I'll ask my questions. I'll then ask the
2 parties to come up to see if there's any additional questions
3 they want me to ask, before then I allow them to ask questions.
4 I then usually will excuse the jury and see if we need to do
5 some additional individual voir dire up here with the attorneys
6 or so forth before we're finishing off and start making
7 strikes. So I'm going to give you the opportunity to seek that
8 on either side if that's necessary.

9 MR. GOLDSTEIN: Thank you.

10 MR. BLACKWELL: And, Your Honor, I'm sorry.

11 THE COURT: Yes, Mr. Blackwell.

12 MR. BLACKWELL: Just one more thing.

13 THE COURT: Sure. No. That's why I wanted to talk
14 about -- while we're all here.

15 MR. BLACKWELL: The lawyer saying the saying, just one
16 more thing. But as I recall, you give a certain amount of
17 strikes to the government, and you give a certain amount of
18 strikes to the defense, and each side gets their own strikes.

19 THE COURT: Yeah.

20 MR. BLACKWELL: We'd ask, and I think consistent with
21 your prior practice, that they not be allowed to kind of merge
22 their strikes and collaborate with them.

23 THE COURT: Correct.

24 MR. BLACKWELL: And if there are any jury consultants
25 that might be employed, that those jury consultants work with

1 whatever side employs them and not, you know, ferry information
2 back and forth so that, you know, they're not basically merging
3 all their strikes together to -- you know, to work them
4 together.

5 THE COURT: Right. Yeah. My general practice is to
6 give both defendants equal number of strikes as the government.
7 That's more than is required by the rule. But you'll have to
8 exercise your strikes independently. The reason I do that is
9 there sometimes can be a situation where the defendants, at the
10 beginning of evidence at trial, might be pointing the finger at
11 each other. And that's why I think y'all are each entitled to
12 your own strikes as to who you think the jury should be. But
13 there shouldn't be collaboration about that. That's my general
14 view. But I give you more for that reason.

15 Anything further, Mr. Blackwell?

16 MR. BLACKWELL: Not on this matter. There's one other
17 matter. We ask that --

18 THE COURT: Oh, that's right. Y'all needed to --
19 okay. Let me find out about this, and then I'll come back.

20 MR. BLACKWELL: And then we'd ask to be allowed to
21 approach on that matter.

22 THE COURT: Oh, sure. Of course. Anything further as
23 to the jury selection, Mr. Goldstein?

24 MR. GOLDSTEIN: Nothing further, Your Honor.

25 With respect to pointing fingers, we anticipate that

1 there'll only be one [inaudible].

2 THE COURT: Okay. All right. Very good.

3 Mr. Watts, anything further on the jury selection issue,
4 sir?

5 MR. WATTS: Not on the jury selection.

6 THE COURT: All right. Very well.

7 Now, you needed to approach as to another matter. And is
8 it all three?

9 MR. BLACKWELL: All three, probably. It wouldn't
10 hurt.

11 THE COURT: Okay.

12 (At the bench)

13 MR. BLACKWELL: Thank you, Your Honor. I don't
14 believe it impacts Mr. Watts' client, but it doesn't hurt him
15 being here.

16 MR. WATTS: [Inaudible].

17 THE COURT: I think it's on the record. It's just not
18 --

19 MR. WATTS: [Inaudible].

20 THE COURT: Right.

21 MR. BLACKWELL: Mr. Harris was counsel in this case,
22 and he's removed himself. We put kind of a Chinese wall, for
23 want of a better word.

24 THE COURT: I saw that.

25 MR. BLACKWELL: We don't discuss the case with him.

1 He's not involved. And the reason that is, is Mr. Harris'
2 daughter was recently married. And, generously, Mr. Goldstein
3 allowed them to use his house for the -- I think it was a week
4 ago or whatever it was.

5 MR. GOLDSTEIN: A week ago Saturday, Your Honor.

6 THE COURT: [Inaudible].

7 MR. GOLDSTEIN: [Inaudible] -- you would have been
8 very proud.

9 MR. BLACKWELL: I wasn't invited.

10 THE COURT: If I had done it, then I could recuse
11 myself. But go ahead.

12 MR. BLACKWELL: But it was determined, because of
13 that, that it would be best, for appearances reasons and things
14 like that, that Mr. Harris go off the case.

15 THE COURT: Sure. All right.

16 MR. BLACKWELL: We've been given some -- the
17 recommendation has been, just because of that, that
18 Mr. Farthing kind of be apprized of -- and I've spoken with --

19 MR. GOLDSTEIN: I have no objection.

20 MR. BLACKWELL: -- Mr. Goldstein and Ms. Orr about
21 this, that Mr. Farthing be apprized of his right to
22 conflict-free counsel --

23 THE COURT: Sure.

24 MR. BLACKWELL: -- and understand the conflict and
25 agree to waive it, just to clear up the record. I don't

1 necessarily believe there's a conflict, but that's what's been
2 advised. And I've discussed it with Mr. Goldstein --

3 MR. GOLDSTEIN: He has.

4 MR. BLACKWELL: -- and Ms. Orr, and they think it's
5 probably just a good idea to clean it up.

6 THE COURT: All right. Do you want -- do you want me
7 to do it here at the bench, or do you want me to clear it and
8 do it another time without everybody here? However you want to
9 is fine. I'm going to leave it up to you, sir.

10 (Discussion off the record)

11 (At the bench)

12 THE COURT: The attorneys just raised a little issue
13 for me that I wanted to address and make sure you understood.
14 There was a prosecutor on this case before, Bill Harris. And
15 Mr. Harris was in the case, but his daughter got --
16 Mr. Goldstein allowed his house to be used for his daughter's
17 wedding. And because of that, there's like a connection
18 between Mr. Goldstein and Mr. Harris.

19 Mr. Harris isn't on the case anymore, but you might be
20 concerned that, you know, maybe Mr. Goldstein has a conflict if
21 he's friends with Mr. Harris and Mr. Harris actually had his
22 kid married at his house. Has Mr. Goldstein told you about
23 this situation?

24 DEFENDANT FARTHING: Yes.

25 THE COURT: All right. In light of this situation, do

1 you wish to go forward with Mr. Goldstein at this time, or
2 would you prefer to have a different attorney?

3 DEFENDANT FARTHING: I would like to go with
4 Mr. Goldstein.

5 THE COURT: All right. You understand that you're
6 entitled to have an attorney that is completely free of any
7 conflict, even a conflict like being friends with the
8 government, that -- in any way that might influence them? You
9 understand you have that right?

10 DEFENDANT FARTHING: Yes, sir.

11 THE COURT: All right. Very well.

12 Knowing that right, you want to go forward with
13 Mr. Goldstein at this time?

14 DEFENDANT FARTHING: Yes, sir.

15 THE COURT: All right. Very well.

16 Mr. Blackwell, anything further?

17 MR. BLACKWELL: No, sir. Thank you.

18 THE COURT: All right. Thank you, sir. We'll have
19 that on the record.

20 MR. BLACKWELL: Thank you.

21 (At the bench off the record)

22 (Open court)

23 THE COURT: All right. I think that takes care of the
24 matter at the bench. But is there any other matter that we
25 needed to put on the record or any other concerns,

1 Mr. Blackwell?

2 MR. BLACKWELL: Nothing else. We appreciate it, Your
3 Honor.

4 THE COURT: All right. Mr. Watts, anything further at
5 this time, sir?

6 MR. WATTS: Would now be the time to bring up a small
7 discovery issue? You mentioned it, and I just --

8 THE COURT: About to say, I'm not -- I don't have it
9 before me. I mean, you can -- if you want to put it on the
10 record or maybe address it with Mr. Blackwell and then see if
11 there needs to be a motion.

12 MR. WATTS: I'll do that. Okay.

13 THE COURT: All right. Very well.

14 Mr. Goldstein, anything further at this time?

15 MR. GOLDSTEIN: Nothing further, Your Honor. Thank
16 you.

17 THE COURT: All right. That concludes this hearing.
18 We'll be in recess.

19 * * *

20 (Hearing adjourned at 11:07 a.m.)
21
22
23
24
25

-oOo-

I certify that the foregoing is a correct transcript from
the electronic sound recording of the proceedings in the
above-entitled matter.

Date: 9/13/2018 /s/ Chris Poage
655 East Cesar E. Chavez Blvd., Suite G-65
San Antonio, TX 78206
Telephone: (210) 244-5036